

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO: 1:19-CR-118

AARON WILLIAM FEIN,

Defendant.

* * * *

SENTENCING HEARING

* * * *

BEFORE: THE HONORABLE PAUL L. MALONEY
United States District Judge
Kalamazoo, Michigan
March 4, 2020

APPEARANCES:

APPEARING ON BEHALF OF THE PLAINTIFF:

NILS KESSLER
Assistant United States Attorney
P.O. Box 208
Grand Rapids, Michigan 49501-0208

APPEARING ON BEHALF OF THE DEFENDANT:

JAMES STEVENSON FISHER
Federal Public Defender
50 Louis Street, N.W., Suite 300
Grand Rapids, Michigan 49503-2633

1 Kalamazoo, Michigan

2 March 4, 2020

3 at approximately 9:05 a.m.

4 PROCEEDINGS

09:05:59 5 THE COURT: This is File Number 19-118; The United
6 States of America vs. Aaron Fein. This matter is before the
7 Court for sentencing.

8 The Court's file reflects that on July 19, 2019,
9 the defendant pled guilty before this Judge to false
09:06:16 10 statement, contrary to 18 U.S. Code 1001(a)(2). The Court
11 accepts the plea agreement finding the charges pled to
12 adequately reflect the seriousness of the offense behavior.

13 The Court's presentence officer scored this case at
14 Offense Level 13, Criminal History Category I, resulting in
09:06:38 15 an advisory guideline range of 12 to 18 months. The
16 defendant has two objections to the scoring of the
17 guidelines, which the Court will address momentarily, after
18 argument from the parties.

19 The record should reflect that Assistant United
09:06:53 20 States Attorney Nils Kessler represents the government.
21 Attorney James Fisher represents the defendant. The
22 defendant is present in person.

23 Mr. Fisher, have you had ample opportunity, sir, of
24 reviewing the pre-sentence report with your client?

09:07:05 25 MR. FISHER: Yes, your Honor.

1 THE COURT: Subject to your objections, do you
2 concur that the guideline range is 12 to 18 months?

3 MR. FISHER: Yes, your Honor.

4 THE COURT: Thank you.

09:07:12 5 Mr. Fein, is that true, sir? You've had ample
6 opportunity of reviewing the presentence report with your
7 lawyer?

8 THE DEFENDANT: Yes.

9 THE COURT: And are you satisfied with his work and
09:07:21 10 representation of you?

11 THE DEFENDANT: Yes.

12 THE COURT: Thank you, sir.

13 Mr. Kessler, do you concur in the advisory
14 guideline range?

09:07:28 15 MR. KESSLER: I do, your Honor.

16 THE COURT: Are you moving third level?

17 MR. KESSLER: Yes, your Honor.

18 THE COURT: That motion is granted. That does not
19 change the advisory guideline range, because the Court
09:07:35 20 anticipated the making of the motion, and the Court's
21 granting of it. Of course, that's all subject to the
22 objections.

23 So with that, Mr. Fisher, your objections, sir. Go
24 ahead.

09:07:47 25 MR. FISHER: Yes, your Honor. As I've outlined in

1 my objection letter and in my sentencing memorandum, we do
2 have the two objections as noted by the Court.

3 The first one, the 2B1.1(b)(9)(C) enhancement for
4 violation of the prior specific judicial or administrative
09:08:07 5 order injunction, decree, or process not addressed elsewhere
6 in this guidelines enhancement.

7 As I noted in my objection letter and in our
8 sentencing memorandum, the notes that accompany this portion
9 of the sentencing guidelines appear to indicate, and the
09:08:20 10 caselaw I think would support the argument that I've made
11 here, which is that the violation actually has to be the
12 criminal conduct, not just some lengthy established offense
13 conduct that's defined here, but the actual crime itself.

14 And the cases that would support that I've cited in my
09:08:39 15 motion. There are no cases that support an interpretation
16 like this and, in fact, I couldn't find a single case
17 addressing this enhancement 401.001 violation, so we don't
18 have much in the way of precedent to go on here. What we do
19 have is cases that show that the application applied in

09:08:54 20 fraud cases where a court specifically ordered somebody not
21 to do the thing that was the crime. And in the case, I
22 believe it was Johnston, that was phen phen cases from
23 several years ago out of Kentucky, in this case, the Court
24 had ordered the defendant to disburse a settlement and he
09:09:14 25 devised an artifice to defraud the very object of the

1 Court's order.

2 In Ramer, the same issue applied. The offense
3 involved the violation of a prior temporary restraining
4 order in this case. Here we have a Probate Court ordering
09:09:30 5 Mr. Fein not to use or possess firearms he temporarily
6 possessed firearms. That Court order is not the false
7 statement here. So we have a distinction here in the case
8 that I think is a meaningful one, and the application notes
9 would seem to suggest that this applies to a specific fraud
09:09:48 10 on the Court rather than merely violating any Court order at
11 any time during the relevant conduct involved in the case.

12 THE COURT: There is nothing in the text of the
13 guideline that limits this enhancement to just fraud cases,
14 is there?

09:10:03 15 MR. FISHER: I would agree with that, your Honor.

16 And I understand we are out on a bit of a unique
17 ledge here, there is not much in the way of precedent to
18 define the issue.

19 THE COURT: That's true. Okay. Thank you, sir.

09:10:15 20 MR. FISHER: The next issue--

21 THE COURT: Let's do them one at a time.

22 Mr. Kessler, on this objection, go ahead, sir.

23 MR. KESSLER: Yes, your Honor.

24 I think that you just touched on what is the most
09:10:25 25 important part, is that the plain language of the

1 enhancement says you get two levels if the offense involved
2 a violation of a prior judicial order. And involved, I
3 think, is the most important word there.

4 As to the two sub-arguments here; first, that it
09:10:38 5 applies only to financial fraud, the language means what it
6 says, and it doesn't say financial in there and the language
7 itself of the enhancement doesn't use the word fraud either.
8 I understand that there are cases where it is applied to
9 financial fraud cases, that's no surprise, but none of those
09:10:54 10 say that it applies only to financial fraud cases.

11 I think it's important that the sentencing
12 commission, acting as an arm of Congress here, indexed the
13 1001 crime to Section 2B1.1, which means they meant for this
14 guideline to apply to 1001 cases, and that implies that they
09:11:13 15 meant for all the possible enhancements under 2B1.1 to apply
16 to these cases. They know how to say otherwise if they mean
17 to say otherwise, and they didn't.

18 THE COURT: 2B is a, to use a pejorative term, a
19 great garbage bin for a lot of offense of convictions.

09:11:30 20 MR. KESSLER: It is.

21 THE COURT: When to a certain extent I think the
22 original sentencing commission couldn't figure out where to
23 put them--

24 MR. KESSLER: I like to think of it as a multi-tool
09:11:42 25 as opposed to a garbage bin.

1 THE COURT: As a result of that, there are all
2 kinds of factual scenarios involved in the application of
3 this particular guideline. But you would agree with Mr.
4 Fisher, and Mr. Fisher argues, of course, that most of the
09:11:56 5 caselaw involves financial crimes, for obvious reasons,
6 because that's where financial crimes go.

7 MR. KESSLER: I do agree. And I also agree that I
8 was not able to find any cases where it was actually applied
9 to this, but that doesn't mean that it shouldn't or that it
09:12:10 10 can't.

11 And as to the second part of the, you know,
12 argument that Mr. Fisher is making, essentially saying that
13 the lying itself had to be the violation of the order, but
14 that again, is not what the plain language says. It says
09:12:23 15 that the offense of conviction had to involve a violation of
16 the prior judicial order. He is lying about shooting a gun
17 and about having a gun, and having guns is what the prior
18 judicial order was about. It involved having guns. I think
19 it's important for to us look at what the purpose of this
09:12:40 20 is, and it actually spells it out in that same application
21 note; the purpose of this enhancement is to recognize that a
22 defendant who fails to comply with such order demonstrates
23 aggravated criminal intent. So we have to ask ourselves if
24 that is the issue in this case, and I would say it is here.
09:12:56 25 A defendant like Mr. Fein who was not under a prior judicial

1 order not to have guns, would be less culpable than somebody
2 who did what he did. A judge told him you can't have guns.
3 After a mental health evaluation, they basically said this
4 is dangerous, you should not have guns, and he went out and
09:13:13 5 got guns, and was shooting them, and was trying to make one
6 in his own ^ house ^ how is ^ how's, and then he lied about
7 it. And that is clearly involved in the offense.

8 THE COURT: Mr. Fisher?

9 MR. FISHER: Briefly, your Honor.

09:13:23 10 THE COURT: Yes, sir.

11 MR. FISHER: In terms of precedent, I would also--
12 I didn't do this in my memo, but I would point to the
13 opinion that I attached to this case where 1001 was the
14 count of conviction. The Stone case that I've referenced in
09:13:37 15 my memo. In that case, there was no application of this
16 particular enhancement where I think it would apply. There
17 were several judicial orders in that case that were violated
18 during the pendency of that case, and the government in that
19 case, did not argue for the enhancement. So we do have some
09:13:49 20 precedent that that application of that enhancement
21 shouldn't apply even when there are direct prior judicial
22 orders during the pendency of a case. That would be my
23 response argument.

24 The other argument I would have is there are
09:14:02 25 several sections in 2B1.1 that I don't think can reasonably

1 apply to the context of a false statement to a law
2 enforcement officer. If the law exceeded \$550 million these
3 are all clearly defined as financial issues. I think the
4 Court has identified the problem we have with 2B1.1 cases,
09:14:23 5 is the guidelines don't specifically address this case or
6 this kind of conduct.

7 Thank you.

8 THE COURT: I certainly concur with that. And the
9 use of the 2B1.1 guideline in this particular circumstance
09:14:37 10 doesn't quite fit, and the Court is left with applying the
11 guideline as it is. Based on the facts of the case, this is
12 obviously a fact intensive analysis that's required here.

13 I'm going to overrule the defendant's objection on
14 this objection. The Sentencing Commission prescribed the
09:15:02 15 guideline for 2B1.1 for violations of 1001, which is the
16 count and crime of conviction. Therefore, in the absence of
17 authority to the contrary, it's presumed that the guideline
18 applies to this case, not just financial crimes, as the
19 defendant has suggested. Recognizing, of course, Mr. Fisher
09:15:26 20 is absolutely accurate, that most of the caselaw involved
21 here is in the context of financial crimes.

22 Further, the application note supports the
23 application of the enhancement to this scenario. The
24 application note states that the enhancement should apply if
09:15:42 25 a defendant commits a fraud in contravention of a judicial

1 order. Fraud by definition includes the knowing concealment
2 of material fact. That's Black's Law Dictionary 11th
3 Edition 2019.

4 In this case, the offense conduct, the defendant
09:15:59 5 made a material false statement to conceal his possession of
6 firearms, which was conduct prohibited by the judicial
7 order. Accordingly, the Court finds that the guidance from
8 the application note lends itself to the ultimate
9 application of this particular enhancement. Accordingly,
09:16:18 10 the objection to this enhancement, which is Paragraph 55 is
11 overruled.

12 And now let's move to 56. Go ahead, Mr. Fisher.

13 MR. FISHER: Your Honor, I think we are a little
14 bit on stronger footing with this objection. Probation, I
09:16:36 15 think, included this enhancement for the possession of a
16 firearm in connection with the offense, and the guidelines
17 provided for, "If the offense involved possession of a
18 dangerous weapon including a firearm in connection with the
19 offense." We don't have any defining language in 2B1.1, but
09:16:51 20 we do have defining language of "in connection with" in
21 other parts of the guidelines. And in caselaw that's
22 developed dealing with that in the context of firearms in
23 drug cases. What we have there is the gun has to somehow
24 facilitate, augment, or encourage, or induce, or embolden
09:17:10 25 the person to commit the underlying offense. Here the gun

1 was possessed at a shooting range a day before the false
2 statement was made. There's absolutely no way that he could
3 have been emboldened by the possession of the firearm. The
4 facts themselves don't support that he was emboldened,
09:17:25 5 encouraged, induced or in any way emboldened to make a false
6 statement.

7 The recording we played during the motion to
8 suppress, if the Court recalls, is profuse with Mr. Fein's
9 essentially begging that he not go back to a mental health
09:17:37 10 facility. The false statement here was designed
11 specifically to help him in that narrow sense avoid being
12 sent to a mental health facility again. There is no
13 indication whatsoever the gun assisted or facilitated that
14 false statement or any false statement in this case.

09:17:52 15 So when you look at the lack of definition in 2B1.1
16 and the definitions that we do have in the other sections of
17 the guidelines, there has to be some sort of nexus between
18 the actual crime and the gun, not merely that the lie or
19 false statement of a fraud was about a firearm, but that it
09:18:11 20 actually encouraged, induced, facilitated, or otherwise
21 emboldened the defendant to commit the crime itself. We
22 just don't have that here. The application, I believe, is
23 clearly inapplicable.

24 THE COURT: Thank you, counsel.

09:18:22 25 Mr. Kessler.

1 MR. KESSLER: Yes, your Honor.

2 I think we are going through the same exercise here
3 where we have to go back again first to looking at the
4 specific words of what the enhancement says, and it says "in
09:18:35 5 connection," not facilitating. And Congress and the
6 Sentencing Commission know how to say facilitating if they
7 mean it. So what we have here is trying to interpret it
8 based on some caselaw, and I grant there is a case at least,
9 the Gibbs case, from out of circuit where it applied it in a
09:18:51 10 case where it was facilitating. And even if you read Gibbs
11 to say it had to facilitate, Gibbs itself recognized that
12 there are other circuits that disagree. For example, in the
13 Bennett case, the Court specifically came out and said it
14 does not have to facilitate it. So I don't think that you
09:19:06 15 can read it into the language just because you want to. I
16 think the best example that I was able to find of an example
17 where it clearly didn't have to facilitate it was the Greig
18 case, which as Mr. Fisher pointed out when we were talking
19 about it before, actually involved Whitey Bulger case. I
09:19:22 20 hadn't noticed it the first time I looked at it. But the
21 facts of that one are interesting in that the defendant was
22 Whitey Bulger's girlfriend, and she was convicted of
23 harboring Whitey Bulger, and the enhancement applied even
24 though she didn't have guns, Whitey Bulger had guns. Now,
09:19:38 25 you can argue that having guns emboldened and facilitated

1 Whitey Bulger in staying hidden, or in fighting off the
2 police if they had come to find him, for example, but they
3 didn't facilitate his girlfriend harboring him or hiding
4 him. The fact is, the Court said, they were connected to
09:19:53 5 the offense. So I agree with Mr. Fisher, there has to be a
6 nexus, and there is a nexus.

7 THE COURT: Isn't that somewhat like a fortress
8 theory though? I mean I apply fortress theory possession of
9 weapons in drug houses all the time. In this case, we have
09:20:07 10 got-- in the Whitey Bulger case, we have got possession of a
11 firearm at a place where a fugitive is being lodged,
12 correct?

13 MR. KESSLER: Agreed. And it's a necessary, but
14 not sufficient-- or sufficient but not necessary condition.
09:20:20 15 For Whitey Bulger, yes, you could say it furthered his
16 crime, but I'm not seeing how it would have furthered his
17 girlfriend's crime in not telling the police where he was.
18 It was connected to it is the issue. Again, you go back to
19 what is the intent of the people who wrote this enhancement,
09:20:36 20 and it's to recognize that somebody who brings a firearm to
21 some other sort of crime is making it more serious. The
22 guidelines are all concerned, not like with a 924(c) where
23 you're trying to decide whether a statute applies. The
24 guideline are concerned with determining what is an
09:20:52 25 appropriate sentence. And so this enhancement is there to

1 say, you know, when somebody brings a gun to another crime,
2 they are more culpable. They are more dangerous. It has to
3 be taken into account in setting what the guideline range
4 is. And in that case, yes, there was a nexus, but it wasn't
09:21:07 5 in furtherance.

6 I don't know if you want me to address there's--
7 If you have other questions on that.

8 THE COURT: No, go ahead.

9 MR. KESSLER: I want to touch on, and Mr. Fisher
09:21:17 10 didn't talk about it here at the podium, but it's in the
11 sentencing memorandum, so I wanted to touch on the other
12 part of it. And if the defense is withdrawing this, I can
13 cut it short. There was an issue about whether it was
14 actually a firearm that he had. I don't know if the
09:21:31 15 defendant is persisting with that, at least in the
16 sentencing objection.

17 MR. FISHER: Just to clarify. That has to do with
18 Count Two that was dismissed in exchange for the plea. It
19 was more relevant conduct than this specific allegation.

09:21:44 20 MR. KESSLER: If there isn't really any argument--

21 THE COURT: I think the gun we are talking about is
22 the gun at the firing range in Ann Arbor, correct?

23 MR. KESSLER: Well, there is both. The one-- They
24 are both relevant conduct, whether it's dismissed or not.

09:21:58 25 And the caselaw is pretty clear on that.

1 The one he was firing in Ann Arbor, clearly a
2 firearm. On video you could see him shooting it. To the
3 extent there's any argument about the other one, it may not
4 be a firearm for regulatory purposes, and I'll just put on
09:22:12 5 the record that I talked with Brian Lutke, who the Court
6 might remember from past cases, he used to be an agent here,
7 and he's in charge of the National Firearms Center now in
8 West Virginia. I sent him pictures of this gun, and he
9 agreed, it's the lower receiver in the unmilled state that
09:22:27 10 it's in would not be a firearm for regulatory purposes. But
11 for guideline purposes, it could be readily converted into a
12 weapon, and it says so right on the box. It says that with
13 tools that you can find around your house you could make
14 this into a functional weapon in under an hour. And this
09:22:42 15 defendant we know has an engineering degree, and has
16 probably more skill and ability to do that than the average
17 bear. So it doesn't sound like we are really arguing about
18 that.

19 I don't know if the Court had anything else on
09:22:53 20 that.

21 THE COURT: I do not. Thank you.

22 MR. KESSLER: Thank you, your Honor.

23 THE COURT: Mr. Fisher, anything else on this
24 issue? Go ahead, sir.

09:22:57 25 MR. FISHER: Just to clarify a couple points. Mr.

1 Fein's engineering degree is in industrial engineering,
2 which is more properly defined as efficiency and processes
3 involving people rather than machinery. I think that's an
4 important distinction to make.

09:23:11 5 To address the government's argument about the
6 firearms parts. I don't think that something that can be
7 milled by a person with limited expertise or skill in a
8 manufacturing process meets the definition of readily
9 convertible, which is why I didn't even bother addressing it
09:23:27 10 with the Court. I think it's sort of a tertiary issue to
11 what we are dealing with here. What I think primary issue,
12 the possession of the firearm I think the primary issue is
13 the possession of the firearm, and I think Mr. Kessler's
14 statement is indicative of our position, Mr. Fein did not
09:23:37 15 bring this gun to the crime. The crime came to the gun, and
16 the government's trying to put the cart before the horse and
17 say that this is all part and parcel of the same thing, when
18 it's not. The crime occurred after the possession of the
19 gun, not before it or not during it, and therefore, the
09:23:53 20 application shouldn't apply to these facts.

21 THE COURT: Thank you, sir.

22 MR. FISHER: Thank you, your Honor.

23 THE COURT: This is again an issue which our
24 circuit has not addressed. Other circuits in other contexts
09:24:06 25 have addressed this particular issue. But in the Court's

1 judgment, application of this enhancement is a bridge too
2 far. I'm going to sustain the defendant's objection to the
3 application of 2B1.1(b)(16)(B). The Court recognizes
4 contrary authority in other circuits, but for purposes in
09:24:38 5 the fact-bound analysis of this particular case, the Court
6 feels the Gibbs case is particularly relevant. So I'm going
7 to sustain the defendant's objection to that application.

8 That exhausts your objections, correct, Mr. Fisher?

9 MR. FISHER: That is correct, your Honor. Thank
09:25:01 10 you.

11 THE COURT: Counsel, if you could turn to Page 11
12 of the presentence report, and let's review where we are in
13 light of that-- those two rulings by the Court.

14 MR. FISHER: Your Honor, may I use my laptop?

09:25:15 15 THE COURT: Oh, sure. You can tell the
16 generational difference between myself, who is dealing with
17 paper, and a lawyer who is, shall we say, slightly younger
18 than me, dealing with a computer.

19 MR. FISHER: I've got my book as well, your Honor.

09:25:40 20 I think we are at Offense Level 9.

21 THE COURT: Okay. All right. We have got a base
22 and I'm starting at Paragraph 54, we have a Base Level of 6.
23 We have got the application of Paragraph 55. I overruled
24 the defendant's objection to that. That gets us to Offense
09:26:01 25 Level 10, because of the directive if the resulting offense

1 level is less than 10, four levels are added, so that gets
2 us to 10. I sustained the objection to 56. The obstruction
3 objection gets us to 12. And under those circumstances,
4 third level doesn't apply. So the adjusted Offense Level
09:26:28 5 would be 12, after acceptance, it becomes 10. So the
6 guideline range after the disposition of the defendant's
7 objections becomes 10/I. And let me see if the parties
8 concur.

9 MR. KESSLER: I do, your Honor.

09:26:50 10 MR. FISHER: I do as well, your Honor.

11 THE COURT: All right. Thank you.

12 That makes the advisory guideline range six to
13 twelve months.

14 The Court's had the benefit of the government's
09:27:08 15 sentencing memorandum, which is ECF 65, the defendant's
16 sentencing memorandum at 66. The Court has also reviewed
17 the report from the mental health professionals of the
18 Bureau of Prisons as well as the other documentation which
19 has been attached to everyone's memos.

09:27:32 20 So with that, Mr. Kessler, allocution on behalf of
21 the government.

22 MR. KESSLER: Yes, your Honor. Thank you.

23 Well, we have all seen how often this sort of thing
24 comes up, often and more tragic circumstances nowadays. So
09:27:46 25 we all know that when all of the signs are there that

1 somebody is planning to commit a mass shooting or a bombing,
2 we have to take it seriously. And I think in a case where
3 somebody is preparing, training, arming themselves, it's
4 deadly serious, and that's what we have in this case. This
09:28:02 5 defendant repeatedly went out and tried to get
6 semi-automatic weapons, actually got a Glock pistol at one
7 point, tried to buy all the ammunition in a store at another
8 point. One semi-automatic assault weapon after another. He
9 was training at various gun ranges, trying to make a bomb at
09:28:18 10 home.

11 Now, do we think he actually belongs to Al-Qaeda or
12 espouses some sort of radical Islamic motivation just
13 because he had that material? No. They just had the best
14 schematics for a bomb out on the internet that you could
09:28:35 15 get. Do we think he's some kind of white supremacist
16 because he asked his aunt to get him a copy of Mein Kampf?
17 Probably not. But all the research shows people who want to
18 commit mass shootings are looking for excuses or validation,
19 some framework to make them think they are something other
09:28:48 20 than a mad man who wants to hurt people.

21 We don't know exactly what the motivation was. We
22 do know he was interested in committing an act of mass
23 violence. He researched it constantly, talked about it with
24 people who have interviewed him, and then he was going out
09:29:02 25 and was actually preparing to do it.

1 Now, the defense has said that this is basically a
2 thought crime. They said he had no criminal history, so
3 can't hold that against him. And it was legal for him to
4 purchase a firearm. I want to hit on each of those things.

09:29:17 5 First off, the idea that this just a thought crime,
6 that everything he did other than the actual lie at the end
7 shouldn't count against him. The fact that either thoughts
8 as opposed to actions beforehand doesn't mean they are
9 irrelevant, and you can see that in all kinds of other
09:29:32 10 contexts. It's perfectly legal, for example, to set up
11 offshore accounts in places like the Bahamas or whatever,
12 but it would be relevant in a case where somebody was
13 committing a financial fraud scheme.

14 Now, this guy is a college graduate. He had no
09:29:46 15 criminal history, and it was legal for him to have guns.
16 All those things are true. Again, they do not negate what
17 his intent was. If you look at the cases like this where
18 things went wrong; Dylann Roof, 21 years old, close to the
19 same age as this defendant, no criminal history until he
09:30:02 20 shot ten people at a Charleston church with a legally
21 purchased firearm. Nikolus Cruz, 21 years old, no criminal
22 history, until he shot 34 people at Parkland High School,
23 with a legally purchased gun. Stephen Paddock, a successful
24 businessman, no criminal history, until he shot 500 people
09:30:21 25 from a window in Las Vegas, with legally purchased guns.

1 And finally, Timothy McVeigh, decorated veteran, no criminal
2 history, until he blew up the federal building in Oklahoma
3 City. The public was never harmed up until then, that's
4 true. And it's true in every one of these cases, until it
09:30:37 5 wasn't. And in this case, the public wasn't harmed because
6 the FBI had to follow him around for months. They had a GPS
7 tracker on his car. They had people driving around
8 following him, watching him everywhere he went, and were
9 able to intervene at key moments like when he actually got a
09:30:54 10 Glock semi-automatic pistol. That is why the public was
11 never harmed, not because he didn't mean it. Now he is
12 saying at this point that he didn't mean to do it, and he
13 was never going to hurt anybody, but I know this Court's
14 been around a long time, we have heard that before. People
09:31:09 15 have intent that is very different from what they say their
16 intent was when they are in here for sentencing. Suddenly,
17 I was never going to do it. I didn't mean it. Do we trust
18 that? Can we? I think we have to look at his behavior, and
19 not the words he is saying at his sentencing when he's
09:31:25 20 motivated to downplay it.

21 Every time a federal firearms licensee refused to
22 sell him a gun, he went to another one. He would go to
23 another town, if he got stopped. He would go to another
24 state, if he got stopped. Those are not the actions of
09:31:38 25 somebody who didn't mean to do anything. That's an awful

1 lot of preparation and trouble to put yourself to if you
2 were just looking for attention.

3 When his training got stopped in the middle here,
4 he went to Ohio to try and find another place where he could
09:31:51 5 go shoot and train on a semi-automatic weapon. When the FBI
6 kept getting in the way, and got him to surrender his gun,
7 he started making one in his basement, and he started making
8 a bomb in his basement.

9 The defense wants you to believe, and what he is
09:32:05 10 trying to say now, is that he was just looking for
11 attention. Well, he got attention, that's true. But a lot
12 of what he was doing is exactly the opposite of what you
13 would do if you were just looking for attention. If you
14 want attention, you go on Twitter, and you start talking all
09:32:20 15 the time about what you are going to do. You post it
16 on-line, you go talk about it in a public square. He was
17 doing things surreptitiously, like trying to go to another
18 state to get firearms training, trying to go to another FFL
19 that hadn't blocked him yet to try and get a gun, and then
09:32:35 20 making weapons in the basement. Those are not cries for
21 attention, that's trying to hide your preparations to go
22 ahead and actually do it.

23 Now, as to the fact that he admitted his conduct,
24 yes, he got acceptance of responsibility, because he
09:32:48 25 admitted lying to the FBI. Pretty hard to get away from

1 that when he did it in front of a whole lot of officers and
2 agents. But he-- Has he really accepted what he has done?
3 And we can feel confident that he is not going to do it
4 again? I would say we really can't. And one of the
09:33:04 5 recordings that came up before from the jail was when he
6 actually said, and I cited this in my sentencing memo, when
7 he is talking to his aunt Sheryl, he just-- and I'll leave
8 out the curse words, but he basically said, "I don't
9 understand this. All I did was lie to them. What is the
09:33:19 10 big deal?" That's how he really feels. He understands he
11 lied to the FBI and we could prove it, so he had to admit
12 it, but that doesn't mean that he has internalized that what
13 he was doing was wrong.

14 Now, the defendant is arguing that supervision in
09:33:33 15 this case is enough. Just watching him, trying to make sure
16 that, you know, he stays on the-- stays on the path that's
17 going to be enough to protect public safety. The FBI was
18 following him around, as I mentioned, for months, with GPS
19 trackers on him, interviewing people he had interacted with,
09:33:51 20 and it still didn't stop him from going on and doing it
21 more. Probation doesn't have those kind of resources. As
22 hard as they work, and as talented as they are, they can't
23 sit on him all the time. Having him at home, that's where
24 he was making a gun, that's where he was making a bomb.
09:34:06 25 Putting a monitor on him to make sure he doesn't leave the

1 house, even that's not going to be enough, because that last
2 firearm he was making, he was making from parts he ordered
3 over the internet. So unless they are going to intercept
4 and open all his packages, even that is not enough.

09:34:19 5 The only real guarantee that he is not going to
6 hurt anybody for some considerable period of time is while
7 he is incarcerated, where he is also hopefully going to get
8 some mental health treatment and come to grips with what
9 he's done. But that is the key 3553(a) factor here.

09:34:36 10 Now, I do think the nature and circumstances of the
11 offense and his characteristics are important as well.
12 Especially, I think, in light of, you know, some of the
13 objections we just dealt with. I understand, you know, the
14 Court's ruling on not enhancing his sentence for the
09:34:50 15 firearm, based on the Gibbs case, but that doesn't mean we
16 can't consider it as part of the nature and circumstances of
17 the offense. And I think it's still fair to say that it is
18 different if he had been lying about an insurance contract
19 or he had been lying about paying his taxes. He was lying
09:35:07 20 about having and making guns that were intended for mass
21 murder, and I think that's important that we look at the big
22 picture here.

23 The defendant would like to say this is just a
24 thought crime. But again, that's not what we have here.

09:35:22 25 The public safety interest is really key, and it's always

1 just thoughts until somebody actually goes out and does it.
2 With this defendant, his acts show that what he was up to
3 was not just thoughts. It demonstrated that he wanted to go
4 out and commit a mass murder. And the evidence proves he
09:35:39 5 knows how to do it, and his preparations were under way.

6 Public safety demands, your Honor, he can be
7 somewhere where he can't hurt anyone for as long as
8 possible.

9 THE COURT: Thank you, sir.

09:35:50 10 Mr. Fisher.

11 MR. FISHER: Your Honor, the government can't foist
12 their multitude of failures in mass shooting cases or change
13 the law about firearms on the back of Mr. Fein's sentence.
14 Unfortunately, that is what they are trying to do here. The
09:36:04 15 fact of the matter is that Mr. Fein lied to officers to
16 avoid being sent back to a mental health hospital. He is
17 begging repeatedly on the recording, which I'm happy to play
18 for the Court, that he not be sent back to a mental health
19 hospital. He is not lying to the officer to avoid detection
09:36:20 20 for planning a mass attack. And the government wants you to
21 believe that he actually did intend and plan to, despite all
22 of the interviews, all of the conversations, all of the
23 discussions he had with multiple agents, where he failed at
24 any point to notify them of any plan to attack anybody. The
09:36:35 25 worst thing he did in this case is engage in internet

1 trolling, which the Pope addressed on his ash Wednesday
2 speech as a persistent problem that our world has to deal
3 with. Mr. Fein is not unique in being alienated and being
4 somewhat disappointed in his career prospects. He is not
09:36:55 5 unique in saying inflammatory things on the internet.
6 Certainly that's a problem for all of us to deal with in
7 this technological age.

8 Mr. Fein lied to a law enforcement officer to avoid
9 being hospitalized in a place that he did not want to go.
09:37:10 10 He didn't lie because he was concealing his affinity for
11 people who felt alienated. He admitted that every time he
12 was talked to by the border patrol, by FBI, by Homeland
13 Security, by the local tasks force agents. He admitted to
14 them freely that he felt sympathy for people who were
09:37:28 15 alienated. Your Honor, I'm a criminal defense attorney, my
16 job is to feel sympathy for people that are alienated. Mr.
17 Fein never planned to attack anybody or hurt anybody.

18 THE COURT: Well, that's what he asserts. But what
19 actions did he take? What about the purchase of the vice at
09:37:46 20 the Lowe's or Home Depot or wherever it was?

21 MR. FISHER: I don't think there is anything
22 illegal or questionable about a person purchasing these
23 items.

24 THE COURT: No. In the context of everything else
09:37:54 25 that's going on in this case, Mr. Fisher, what impact, if at

1 all, do you think the purchase of the vice has, because the
2 vice is necessary to convert the other components that he is
3 already-- that he already has, right?

4 MR. FISHER: Right.

09:38:12 5 THE COURT: So what impact do you think that should
6 have?

7 MR. FISHER: In all honesty, your Honor, I think
8 it's completely irrelevant. I don't think it has any
9 bearing whatsoever on the facts of this case. I think Mr.
09:38:21 10 Fein's ability to or plan to build a firearm, which may or
11 may not have developed prior to or after the Probate Court's
12 order, has no bearing on what he actually planned to do
13 here.

14 THE COURT: What do you make of the jail recording
09:38:33 15 where he basically says, "What's the big deal about lying to
16 the FBI?" Does that auger well for compliance moving
17 forward?

18 MR. FISHER: Your Honor, I would attribute that to
19 largely to Mr. Fein's mental health issues that we are well
09:38:48 20 versed in after dealing with this case. There are multiple
21 records, multiple conversations before he was ever charged
22 with any crime, and subsequent records indicating he has a
23 profound mental health disorder. That statement came before
24 he even received treatment from the Bureau of Prisons, as
09:39:04 25 far as I'm aware. And my understanding now is that Mr. Fein

1 is medicated. He is compliant with the medication that was
2 recommended. And aside from his transfer from Newaygo to
3 here which interrupted his medication, he is now in a much
4 calmer state. People say things on jail recordings all the
09:39:19 5 time that I have to listen to, some of them are
6 inflammatory, some of them are blowing off steam. Mr. Fein
7 may or may not be in the same state that he was in when he
8 made those statements. My belief is that the medication and
9 the treatment he has received since making those statements
09:39:32 10 has had an impact on his ability to comport himself with the
11 requirements of the law. That he understands now if the
12 Court orders any mental health treatment, orders any
13 medication to be taken, that he has to comply with those
14 requirements or he will be sent back to jail. My option
09:39:47 15 here, my proposed solution to this case affords the Court
16 with ultimate latitude to re-sentence Mr. Fein to what the
17 government is suggesting, if Mr. Fein steps out of line one
18 time. If he fails to take his medication, if he fails to go
19 to out-patient treatment, if he fails to go to in-patient
09:40:01 20 treatment, if he orders something he shouldn't order on the
21 internet, the Court can sentence him to the maximum extent
22 of the law, but to suggest that because of what the
23 government thinks he might be planning to do, he deserves a
24 five-year prison sentence, is a tragedy of justice, and I
09:40:16 25 cannot stress that any more than I am right now. It would

1 be completely inconsistent with the proportionality
2 requirements of the sentencing guidelines and with the
3 actual offense conduct in this case, which again, was Mr.
4 Fein lying to avoid, at that time, being sent back to a
09:40:30 5 mental health facility.

6 THE COURT: What do you make of the encryption of
7 the computer?

8 MR. FISHER: After he had already been--

9 THE COURT: In the context of everything else that
09:40:39 10 was going on?

11 MR. FISHER: Your Honor, it's hard for me to
12 describe the weirdness and how I feel about these particular
13 facts.

14 At no time during the course of this investigation
09:40:50 15 was Mr. Fein doing anything illegal. He is allowed to
16 encrypt his computer. He is allowed to do all these things.
17 The government's investigation appears to have been spurred
18 merely by fear. And I don't know what law he violated to
19 justify it, frankly. I understand there are concerns here.

09:41:07 20 I understand people have done horrible things. But
21 repeatedly during these conversations, Mr. Fein is giving
22 them access to his property, giving them access to his
23 computer, admitting his affinity for people with, I would
24 say dubious reputations, to say the least, and they have not
09:41:22 25 been cut off in any way. Even if he encrypted his computer,

1 he was also giving them his cell phone, giving them his
2 laptop, and allowing them to image the entire thing. So I'm
3 not sure that the fact that he had at some point encrypted
4 it really means anything. He was at every turn turning over
09:41:35 5 the property until the Probate Court ordered him not to
6 possess firearms, which is the central issue that caused
7 this crime to happen in the first place.

8 I don't think that any of the tertiary issues the
9 government has identified as warranting concern are
09:41:48 10 justified, and I think the government's proposed solution is
11 inconsistent with the massive government intervention that
12 already occurred in this place.

13 I do believe that probation can handle managing Mr.
14 Fein's internet activity. I believe they can manage
09:42:01 15 handling his cell phone activity. They can manage handling
16 his mail. Those aren't things that are too far beyond the
17 tools of the government. And if this Court agrees with me
18 and sentences him to probation, one step out of line lands
19 Mr. Fein back in a prison, to the fullest extent that it's
09:42:16 20 available to the Court. It's a just sentence. It's a
21 reasonable sentence within the guidelines, I think at this
22 point, since he has already served that much time in prison
23 or in jail.

24 THE COURT: This is new information regarding his
09:42:29 25 taking of prescribed medication.

1 MR. FISHER: Yes, your Honor.

2 THE COURT: When did that start?

3 MR. FISHER: That started probably right around the
4 time he came back and I noted that he was not taking his
09:42:39 5 medication.

6 THE COURT: Came back from the examination?

7 MR. FISHER: Yes. It would have been after the
8 PSI.

9 THE COURT: Up until then, he wasn't taking
09:42:49 10 medication as prescribed, correct?

11 MR. FISHER: That is correct, your Honor. One of
12 his diagnoses is anti-social personality disorder with
13 schizoid features. My understanding from dealing with
14 mental health disorders throughout my career, is that
09:43:00 15 schizophrenia, schizoid personality disorders,
16 schizoaffective disorders all have a host of co-occurring
17 symptoms, one of them is an inability to comprehend that you
18 need help. He seems, in his, I think based upon his
19 intelligence and his ability to logically work through this
09:43:17 20 process with me, working together on this issue, has been
21 able to realize he needs to take this medication if for
22 nothing else than to address the concerns of the Court and
23 the concerns of probation while he is on any supervision.

24 THE COURT: All right. Thank you, sir.

09:43:31 25 MR. FISHER: Thank you.

1 THE COURT: Mr. Fein, is there anything you wish to
2 say in your own behalf, sir? You may proceed as you wish.

3 THE DEFENDANT: First off, I just want to say I'm
4 sorry that I made the false statement. I'm sorry for my
09:43:55 5 behavior. I didn't-- I never wanted things to end up like
6 this. I never wanted things to go this far. I'm sorry for
7 violating the Probate Court order.

8 Usually I listen to people, and I didn't listen to
9 the judge when he told me to not possess firearms and to
09:44:43 10 not-- and to take my medication and comply with treatment.
11 I should have listened to him. I would like to think that
12 usually I respect what people say and I have the ability to
13 listen to what they have to say, and that I'm respectful,
14 and that I am able to defer to what they have-- they want me
09:45:12 15 to do when I think that they are right, and that I need to
16 listen to them.

17 THE COURT: Have you concluded or did you want to
18 go on? Go ahead. Take your time.

19 THE DEFENDANT: And I accept responsibility for the
09:45:55 20 crime, and I'm sorry. You know, I didn't want-- I
21 consistently didn't believe I needed to take medication, and
22 then when I was in Newaygo, my lawyer was the one who
23 convinced me to try taking the pills, and I am able to
24 listen to what other people have to say and defer to them
09:46:26 25 when I feel like I don't have the solution or I don't know

1 how to solve the problem. That's it.

2 THE COURT: Have you concluded, sir?

3 THE DEFENDANT: (Nodding.)

4 THE COURT: He is nodding his head yes.

09:46:55 5 MR. KESSLER: Your Honor, can I address one thing
6 he said?

7 THE COURT: Sure.

8 MR. KESSLER: I think it's noteworthy he said, "I
9 can conform my behavior to what other people want me to do
09:47:04 10 when I think they are right." The Kent County court told
11 him not to have guns. He did it anyway. And the FBI told
12 him again and again and again not to have guns, and he went
13 ahead with it anyway. I don't think we can take his word
14 for it.

09:47:17 15 THE COURT: Anything else, Mr. Fisher?

16 MR. FISHER: Your Honor, I can't stress enough,
17 when the FBI asked for his gun, he gave to them, at a time
18 when he was under no legal obligation to do so. He has
19 conformed in every step except for the violation of his
09:47:30 20 Probate Court order with the requirements and confines of
21 the law. That's what we have to deal with here today, the
22 law, not what we think Mr. Fein was going to do maybe.

23 THE COURT: Thank you, sir.

24 It is the Court's duty to impose a sentence
09:47:42 25 sufficient but not greater than necessary to comply with the

1 purposes of sentencing set forth in 18 U.S. Code 3553(a).

2 The Court recognizes the guidelines are advisory to
3 the Court, but I have taken the guideline into account as an
4 initial benchmark or starting point when sentencing in this
09:47:58 5 case.

6 I recognize I must make an individualized
7 assessment based on the facts presented. The guideline
8 range is one of the array of factors warranting
9 consideration.

09:48:08 10 I also fully recognize my discretion in determining
11 an appropriate sentence as recognized by the United States
12 Supreme Court in its decisions in Booker, Kimbrough, Rita,
13 Gall, Spears, and the Sixth Circuit case of Herrera-Zuniga.

14 Pursuant to Tapia vs. The United States, at 131
09:48:25 15 Supreme Court 2382, the Court recognizes that imprisonment
16 is not suitable for the purpose of promoting correction and
17 rehabilitation.

18 I have considered all of the defendant's arguments
19 in support of his request for a lower sentence.

09:48:38 20 The 3553 factors are the nature and circumstances
21 of the offense and the history and characteristics of the
22 defendant. The sentence must reflect the seriousness of the
23 offense; promote respect for law; provide just punishment
24 for the offense; afford adequate deterrence to criminal
09:48:54 25 conduct; protect the public from further crimes of the

1 defendant; provide the defendant with needed medical,
2 educational, and/or correctional treatment; the need to
3 avoid unwarranted sentencing disparity among similarly
4 situated defendants; any guideline policy statements that
09:49:08 5 pertain; and the kinds of sentences available to the Court.

6 First, as is obvious from this record, the Court
7 recommends that the defendant receive mental health
8 treatment and counseling while he is incarcerated. That
9 seems to me is the absolute priority for the time that Mr.
09:49:32 10 Fein is going to be incarcerated within the Bureau of
11 Prisons, that he work with his mental health treatment
12 providers and come to understand the circumstances under
13 which he committed this offense. The commission of the
14 relevant conduct, which I think has some major import in
09:49:54 15 determining a sentence in this case, and hopefully he can
16 come back to this community and be a law abiding citizen
17 while on supervised release.

18 The offense of conviction, of course, is a 1001
19 violation of Title 18. The advisory guideline range is six
09:50:16 20 to twelve months. The relevant conduct here is significant
21 involving, number one, defiance of a state court order,
22 which is properly evaluated, in the Court's judgment, by the
23 application of four levels to the base offense level. Mr.
24 Fein was not deterred by inquiries by agents of the Federal
09:50:45 25 Bureau of Investigation. The record reflects what I would

1 refer to as a dogged search for firearms when he was
2 prohibited from having them, "because he was told not to."
3 There were multiple attempts, the purchase of the kit and
4 the tools, especially the vice, to convert the parts that he
09:51:12 5 had already is particularly aggravating in the Court's
6 judgment, and aggravates the offense conduct as far as
7 relevant conduct is concerned.

8 In addition to that, we have got additional
9 obstructive behavior, soliciting a fellow inmate to make a
09:51:36 10 call to his aunt to destroy evidence or secrete evidence
11 and, of course, Mr. Fein probably wasn't thinking about it,
12 but that placed his aunt potentially, and his cellmate in
13 difficult circumstances vis-a-vis the Federal Bureau of
14 Investigation in terms of doing things that might be
09:51:56 15 obstructing an investigation. I'm not suggesting that
16 occurred, but the potentiality for it, when you make that
17 sort of request, is significant indeed. But given that
18 element, the Court finds that two levels for obstruction is
19 not sufficient. This is aggravating enough, in the Court's
09:52:18 20 judgment, that a departure, because two levels doesn't
21 adequately reflect the obstructive nature of the defendant's
22 conduct, and the seriousness of that behavior. In the
23 Court's judgment, that requires a departure upward two
24 levels from the advisory guideline range.

09:52:43 25 Possession of the firearm parts in conjunction

1 with-- for the purpose of constructing an AR-15, and the
2 defendant expressed an intention to do it, in that context,
3 the Court finds that that conduct which in the Court's
4 judgment is relevant conduct for the Court to consider, is
09:53:08 5 not taken into the guidelines as scored. Accordingly, a
6 departure pursuant to 5K2.0(a)(2)(B) is appropriate, and the
7 Court intends to depart upward two levels for that reason
8 also.

9 Now, as far as the 3553 factors are concerned,
09:53:33 10 specific deterrence of Mr. Fein is a significant factor for
11 the Court to consider here. I recognize he might be in a
12 different place, based on the good advice he has gotten from
13 Mr. Fisher, and the fact that he is now understanding his
14 need to take medication, but specific deterrence of Mr. Fein
09:53:59 15 is a significant factor for the Court to consider. At this
16 point in time, the Court views him as a significant risk to
17 the public. And in addition to that, the Court must fashion
18 a sentence which promotes respect for the law, provides just
19 punishment, and reflects the seriousness of the offense
09:54:20 20 behavior, as well as relevant conduct.

21 Fortunately for Mr. Fein, he's got support in the
22 community from his aunt who raised him. And hopefully he
23 will lean on those pro-social individuals when he is
24 released from confinement. But given the nature of the
09:54:46 25 relevant conduct here, the Court believes that a variance

1 upward of two levels is also appropriate for the reasons
2 that I have-- for the reasons that I have stated.

3 Accordingly, the Court finds after the departure
4 applications and the variance application, that the
09:55:07 5 appropriate guideline range is properly evaluated at Offense
6 Level 16, Criminal History Category I, which results in an
7 advisory guideline range of 21 to 27 months. And it's the
8 Court's intention to sentence Mr. Fein at the top end of
9 that range, considering the nature and circumstances of the
09:55:30 10 offense, the history and characteristics of the defendant,
11 and the other factors that the Court has laid out on this
12 record.

13 Accordingly, it's the judgment of the Court the
14 defendant is committed to the custody of the Bureau of
09:55:41 15 Prisons for a term of 27 months.

16 Upon release from imprisonment, the defendant shall
17 be placed on supervised release for a term of three years.

18 Within 72 hours of release from custody of the
19 Bureau of Prisons, the defendant shall report in person to
09:55:55 20 the probation office in the district to which he is
21 released.

22 While on supervised release, the defendant shall
23 comply with the mandatory and standard conditions of
24 supervision, including DNA collection and drug testing.
09:56:08 25 Additionally, the defendant shall comply with the following

1 special conditions of supervision:

2 Participate in a program of mental health treatment
3 as directed, and follow the rules of the program until such
4 time as he is released from the program by his probation
09:56:22 5 officer, and pay at least a portion of the cost according to
6 his ability to pay, as determined by his probation officer.

7 He is not to possess any firearm. He is not to
8 have any components of a firearm or components to make
9 explosives while he is on supervised release, and he is not
09:56:45 10 to possess any component of any dangerous weapon while he is
11 on supervised release. It is the Court's intention here to
12 write a condition of supervised release, which is broader
13 than just a reference to firearm, components of firearms,
14 anything having to do with explosives, the defendant is
09:57:12 15 prohibited from possessing.

16 If he is unemployed after the first 60 days of
17 supervision or for 60 days after termination or layoff from
18 employment, he must perform at least 20 hours of community
19 service per week as directed until he is gainfully employed
09:57:29 20 full-time.

21 He will be monitored on home detention for the
22 first 12 months of supervision. During that time, he must
23 abide by all technological requirements, location monitoring
24 program rules, and pay all or part of the cost of
09:57:44 25 participation in location monitoring program, as directed by

1 his probation-- by his probation officer.

2 He is restricted to his residence at all times
3 except for employment, education, religious service,
4 medical, substance abuse, or mental health treatment,
09:57:59 5 attorney visits, court appearances, court ordered
6 obligations, or other activities as pre-approved by his
7 probation officer.

8 He must use only computers and computer-related
9 devices which are approved in advance by his probation
09:58:13 10 officer.

11 He must provide his probation officer with all user
12 names, email addresses, passwords, social media accounts,
13 and other forms of internet identification, and must not
14 create additional accounts unless approved in advance by his
09:58:27 15 probation officer.

16 He must participate in the computer internet
17 monitoring program, and must comply with the rules of the
18 program as directed by his probation officer.

19 He must pay the cost of computer monitoring, as
09:58:40 20 directed by his probation officer, and advise anyone in his
21 household or any business entity that he might have contact
22 with, that the computers may be subject to computer
23 monitoring. He must provide all computer related billing
24 records, including but not limited to telephone, cell phone,
09:58:57 25 cable, internet, as directed by his probation officer.

1 Refusal to comply will be a violation of supervision. He
2 must warn anyone with whom he shares a residence that the
3 premises is subject to search pursuant to this condition.

4 He must submit his person, property, house,
09:59:16 5 residence, vehicle, papers, computers, and other electronic
6 devices to a search conducted by the United States Probation
7 Office. Failure to submit to a search may be grounds for
8 revocation of release. He must warn other occupants of the
9 premises where he lives or works that the premises is
09:59:31 10 subject to search pursuant to this condition. The probation
11 officer may conduct a search under this condition only when
12 reasonable suspicion exists that he has violated a condition
13 of supervision, and that the areas to be searched contain
14 evidence of the violation. Any search must be conducted at
09:59:48 15 a reasonable time and in a reasonable manner.

16 The special assessment of \$100 is ordered due and
17 payable immediately.

18 The Court does not intend to impose a fine in this
19 case.

09:59:59 20 Mr. Fisher, any other recommendations to the Bureau
21 of Prisons that you would like?

22 MR. FISHER: Your Honor, I would ask that the Court
23 send Mr. Fein to Butner. He has already got treatment there
24 or closer mental health treatment facilities he can
10:00:14 25 maintain--

1 THE COURT: I'm not picking you up, sir. I'm
2 sorry.

3 MR. FISHER: Sorry, your Honor.

4 Mr. Fein was previously housed at Butner, which is
10:00:20 5 a mental health facility in North Carolina. I think he
6 would like to be housed closer to his family so they can
7 visit him. I'm not sure if there's one closer besides
8 Chicago.

9 THE COURT: I view the mental health recommendation
10:00:32 10 as the absolute first priority here, so I'll put close to
11 home as possible, but I'm going to clearly make it part of
12 the judgment that I believe that the mental health placement
13 is the most important.

14 Mr. Fisher, any legal objection to the sentence
10:00:47 15 imposed, other than those already placed on the record?

16 MR. FISHER: Your Honor, there were two points that
17 I didn't catch. I did catch two points for the vice and two
18 points for the further obstructive behavior. What was the
19 third?

10:01:00 20 THE COURT: The variance upward considering the
21 3553 factors.

22 MR. FISHER: Okay. Your Honor, we would object to
23 the upward variance in this case, the 3553 factors, the
24 guidelines, and the obstructive conduct.

10:01:17 25 THE COURT: Thank you, sir.

1 Are you satisfied that I have addressed all of your
2 arguments?

3 MR. FISHER: I am, your Honor.

4 THE COURT: All right. Thank you.

10:01:21 5 Mr. Kessler, any legal objection to the sentence
6 imposed?

7 MR. KESSLER: No. I just want to clarify this. I
8 think Mr. Fisher and I might be thinking the same thing.
9 Just for the record, I expect Mr. Fisher to appeal, those
10:01:31 10 first two were guideline departures and then the last two
11 essentially a variance of the equivalent of two levels?

12 THE COURT: Correct.

13 MR. KESSLER: Is that what the Court's saying?

14 THE DEFENDANT: Correct. I tried to make that
10:01:42 15 clear but.

16 MR. KESSLER: Well, we said two levels, and I can
17 see him maybe coming back saying the guideline range was now
18 21 to 27. There is difference between departure versus
19 variance.

10:01:55 20 THE COURT: Effectively I departed and I varied
21 upward six levels to 16/I.

22 MR. KESSLER: Right. But the last one equivalent
23 of two levels?

24 THE COURT: Correct.

10:02:06 25 MR. KESSLER: Thank you.

1 THE COURT: You're welcome.

2 Mr. Fein, I advise you--

3 Oh, counts to be dismissed, Mr. Kessler?

4 MR. KESSLER: Count Two, your Honor.

10:02:10 5 THE COURT: Count Two is dismissed pursuant to the
6 plea agreement.

7 Mr. Fein, I advise you, sir, you can appeal your
8 conviction if you believe that your guilty plea was somehow
9 unlawful or involuntary, or if there is some other
10:02:20 10 fundamental defect in the proceeding not waived by your
11 guilty plea.

12 You also have a statutory right to appeal your
13 sentence under certain circumstances, particularly if you
14 think the sentence is contrary to law.

10:02:31 15 You have the right to apply for leave to appeal in
16 forma pauperis if you are poor. If you wish to do so, with
17 a few exceptions, you need to file the appropriate documents
18 within 14 days of the entry of the judgment in this case.
19 Your attorney will prepare and file notice of appeal upon
10:02:45 20 your request.

21 Counsel is advised of his obligation to advise his
22 client of his appellate rights. Should your client wish to
23 pursue an appeal, the forms for filing an appeal can be
24 found on this Court's website or the Court of Appeals'
10:02:57 25 website. Should your client choose to appeal, you're

1 obligated to continue representation of him until such time
2 as you are specifically relieved by the Court of Appeals.

3 Anything further in this matter, Mr. Kessler?

4 MR. KESSLER: No, your Honor.

10:03:11 5 THE COURT: Mr. Fisher?

6 MR. FISHER: No, your Honor.

7 THE COURT: Mr. Fein, work with your mental health
8 professionals, sir.

9 Good luck to you.

10:03:19 10 Defendant is remanded to the custody of the marshal
11 for execution of sentence.

12 COURT CLERK: All rise, please.

13 Court is in recess.

14 (At 10:03 a.m., proceedings concluded.)
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C E R T I F I C A T E

I, Kathleen S. Thomas, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/

Kathleen S. Thomas, CSR-1300, RPR
U.S. District Court Reporter
410 West Michigan
Kalamazoo, Michigan 49007